

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

Item No. 9

AMENDED TENTATIVE ORDER NO. R9-2005-0237
ADMINISTRATIVE ASSESSMENT OF CIVIL LIABILITY

Doc. No. 26

AGAINST
JPMC REAL ESTATE, INC.

AND
CITY OF ESCONDIDO
VIOLATIONS

OF
STATE WATER RESOURCES CONTROL BOARD ORDER NO. 99-08-DWQ
AND
REGIONAL BOARD ORDER NO. 2001-01

The San Diego Regional Water Quality Control Board (hereafter Regional Board), having received an offer by JPMC Real Estate, Inc. and the City of Escondido (hereafter JPMC or City, or collectively referred to as Dischargers) to waive their right to a hearing regarding violations alleged in Complaint Nos. R9-2005-0059 and R9-2005-0097, dated March 10, 2005, (Complaints) and settle their potential civil liability for any violations alleged therein by accepting imposition of Civil Liability in the amount of \$1,250,000 (\$800,000 of which will be ~~suspended~~waived provided that JPMC satisfy the conditions of waiver set forth in this Order) and undertaking binding commitments to achieve compliance with applicable requirements for storm water management at construction sites, and having provided public notice thereof and not less than thirty (30) days for public comment on the settlement offer, and having received no comments objecting to the settlement, and having considered the settlement offer, finds as follows:

1. The State Water Resources Control Board (hereafter State Board) has issued updated statewide general waste discharge requirements for discharges of storm water runoff associated with construction activities involving disturbance of one acre of soil, or more. [*Order No. 99-08-DWQ, NPDES No. CAS000002.*]
2. JPMC-ERTC, an affiliated entity of JPMC, owns approximately 148 acres of property in the 180-acre Escondido Research and Technology Center (hereafter ERTC) development located along Vineyard Avenue and Harmony Grove Road, City of Escondido, San Diego County, California. JPMC filed a "Notice of Intent" to undertake construction activities at ERTC, as required by Section A.2. of Order No. 99-08-DWQ on February 7, 2003 (JPMC's ERTC project is identified as WDID No. 9 37S320081).
3. San Diego Gas and Electric (hereafter SDG&E) owns by way of fee title or easements a power transmission corridor at ERTC as more fully described in Exhibit No. 1 (hereafter SDG&E Property). JPMC contends that it is not JPMC's responsibility to assure

compliance with Order No. 99-08-DWQ on property owned or controlled by others.¹ However, for the purposes of settlement, JRMC has agreed to use its best efforts to assure compliance with Order No. 99-08-DWQ on SDG&E Property.

4. City discharges storm water containing pollutants associated with urban runoff through a Municipal Separate Storm Sewer System (MS4) that is regulated under Regional Board Order No. 2001-01, *NPDES No. CAS0108758, Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of San Diego, the Incorporated Cities of San Diego County, and the San Diego Unified Port District*, as amended by State Board Order WQ 2001-15.
5. JRMC discharged sediment to City's MS4 and navigable waters of the United States in the San Diego Region in violation of Order No. 99-08-DWQ, section A.2. JRMC discharged sediment from the ERTC site directly into Escondido Creek or via City's MS4 on at least ninety-three (93) days:
 - a. February 22, 2004;
 - b. February 23, 2004;
 - c. February 26, 2004;
 - d. October 18 - 20, 2004; (3 days)
 - e. October 27, 2004;
 - f. October 28, 2004;
 - g. December 13, 2004;
 - h. December 28, 2004 through March 15, 2005 (78 days);
 - i. March 24, 2005;
 - j. March 25, 2005;
 - k. March 29, 2005;
 - l. April 15, 2005;
 - m. April 18, 2005; and
 - n. April 29, 2005.
6. JRMC failed to implement its Storm Water Pollution Prevention Plan (SWPPP) by failing to install and maintain adequate Best Management Practices (BMPs) in violation of Order No. 99-08-DWQ section C.2 on at least 217 days:
 - a. February 22 - 26, 2004 (5 days); and
 - b. October 1, 2004 through April 30, 2005 (212 days).
7. JRMC failed to sample at all of the required locations, and failed to analyze for all of the required constituents in violation of Cleanup and Abatement Order (CAO) No. R9-2004-0420 Directive No. 4 on at least 16 days:
 - a. November 21, 2004;
 - b. December 5, 2004;
 - c. December 28, 2004;
 - d. December 29, 2004;
 - e. January 3, 2005;
 - f. January 7, 2005;
 - i. January 11, 2005;
 - j. February 11, 2005;
 - k. February 12, 2005;
 - l. February 18, 2005;
 - m. February 19, 2005;
 - n. February 21, 2005;

¹ JRMC does not dispute that it has entered into ~~an~~ascertain Permission to Grade agreements with SDG&E to perform certain grading activities on the SDG&E Property and that said agreement may require JRMC to indemnify SDG&E in the event that SDG&E is found to be in violation of Order No. 99-08-DWQ.

- g. January 8, 2005;
 - h. January 9, 2005;
 - o. February 22, 2005; and
 - p. February 23, 2005.
8. JRMCM failed to assess the erosion and sediment control BMPs on the ERTC site after each significant rainfall event in violation of CAO No. R9-2004-0420 Directive No. 5 and Order No. 99-08-DWQ section C.4 on at least 16 days. See paragraph 7.
 9. JRMCM failed to submit status reports within seven days of significant rainfall events in violation of CAO No. R9-2004-0420 Directive No. 6 on at least 16 days. See paragraph 7.
 10. City failed to implement, or require JRMCM to implement BMPs to ensure that the pollutant discharges from JRMCM's construction activity into City's MS4 was reduced to the Maximum Extent Practicable (MEP) performance standard in violation of Order No. 2001-01 section E on at least 481 days (January 5, 2004 to April 30, 2005).
 11. Liability in the amount of \$1.25 million is based on staff's preliminary consideration of the factors prescribed in subdivision (e) of Water Code Section 13385 as applied to the allegations contained in Complaint No. R9-2005-0059. Dischargers' settlement offer, attached hereto as Exhibit No. 2, and fully incorporated herein (hereinafter "Offer"), for a payment of \$450,000, including the amounts allocated to Supplemental Environmental Projects (SEPs), and the conditional waiversuspension of \$800,000 of the total liability, is consistent with the State Water Resources Control Board Enforcement Policy guidance for violations of this nature, and with liability imposed for similar violations by the Regional Board in other cases that have been settled.
 12. By accepting the settlement offered by the Dischargers, involving payment of less than the recommended civil liability without the need for a hearing, the Regional Board will conserve valuable staff resources that would have been allocated to preparation for the hearing and responding to any administrative or judicial review requested by the Dischargers.
 13. The reduced amount of liability tendered by the Dischargers is sufficient to deter the Dischargers from future non-compliance, and should act as a deterrent to non-compliance by others.
 14. Following the issuance of Complaint No. R9-2005-0059, JRMCM revised the SWPPP for ERTC, and JRMCM promises to do the following: (1) implement the revised SWPPP including the design, installation and maintenance of compliant sediment basins; (2) fully landscape and irrigate all exterior slopes fifteen feet in length or greater; (3) treat collected storm water runoff as necessary with a chitosan advanced treatment system; (4) mitigate any identified permanent impacts caused by discharges from ERTC to Escondido Creek; and (5) stay in compliance with Order No. 99-08-DWQ at all current and future construction sites.

15. Following the issuance of Complaint No. R9-2005-0097, the City has stated its intention to exercise its regulatory jurisdiction over construction projects to require that the discharge of pollutants from developments to the MS4 be reduced to the MEP.
16. The Regional Board has identified several SEPs within the watershed where ERTC is located that would be acceptable to the Regional Board. JRMC and City may develop and propose alternative SEPs within the watershed where ERTC is located, provided that the proposed alternative SEPs satisfy the SEP criteria developed by the State Water Resources Control Board and Regional Board, however, the Regional Board is not obligated to accept or approve alternative SEPs proposed by Dischargers.
17. Issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code section 21000 et seq.) in accordance with section 15321, Chapter 3, Title 14, California Code of Regulations.
18. The Regional Board incurred costs totaling \$52,148, which includes investigation, preparation of enforcement documents, and communication with the discharger and interested parties regarding the enforcement action.

IT IS HEREBY ORDERED that:

1. Civil liability is imposed upon JRMC Real Estate, Inc. in the amount of \$1.2 million. Contemporaneous with the Boards approval of this order, JRMC shall pay \$200,000 on September 14, 2005 to the State Board for deposit to the State Water Pollution Cleanup and Abatement Account. JRMC may satisfy up to \$200,000 of its liability by funding SEPs acceptable to the Regional Board. If JRMC does not elect to fund SEPs previously determined to be acceptable by the Regional Board and does not develop an acceptable proposal for alternative SEPs to be funded for up to \$200,000 by December 14, 2005, then JRMC will pay the balance of any remaining liability (up to \$200,000) to the State Water Pollution Cleanup and Abatement Account no later than December 14, 2005. The remaining \$800,000 of the liability otherwise due on October 10, 2005 will be waived/suspended if, by October 10, 2005, a qualified licensed professional certifies that JRMC has satisfied the following conditions by October 3, 2005:
 - a. JRMC shall substantially implement the revised SWPPP including the design, installation and maintenance of compliant desiltation basins at ERTC properties owned by JRMC and shall use its best efforts to implement the revised SWPPP at SDG&E Properties;
 - b. JRMC shall have substantially landscaped and irrigated, or covered with fiber mats and other BMPs as described in its SWPPP, all exterior slopes fifteen feet in height or greater at ERTC properties owned by JRMC and shall use its best efforts to implement the revised SWPPP at SDG&E Properties; and
 - c. JRMC shall have/arrange to make available on site a circulation pump and have available on site treatment chemicals so that if at any time, in the future, the capacity of the desiltation or sediment basins at properties owned by

JRMC or at SDG&E Properties becomes overwhelmed, so that it becomes necessary to pump down accumulated sediment laden runoff and discharge it off-site, within forty eight (48) hours the discharge shall be treated in the desiltation or sediment basins with chitosan prior to commencement of pumping.

For the sole purpose of demonstrating that JRMC has satisfied the conditions for the Regional Board waiver of \$800,000 of the civil liability imposed by this paragraph on properties owned by JRMC, JRMC shall submit to the Executive Officer of the Regional Board a certification of substantial conformity with conditions a, b and c above executed by a qualified, licensed professional no later than October 10, 2005.

For the sole purpose of determining whether or not JRMC has satisfied the conditions for waiver of \$800,000 of the civil liability imposed by this paragraph on SDG&E Property, JRMC shall either (i) submit to the Executive Officer of the Regional Board a certification of substantial conformity with conditions a, b and c above for the SDG&E Property executed by a qualified, licensed professional no later than October 10, 2005; or (ii) provide the Executive Officer with a certification of infeasibility no later than October 10, 2005 executed by an officer of JRMC certifying under penalty of perjury that due to the action or inaction of others beyond the control of JRMC substantial conformity with conditions a, b and c could not be achieved at the SDG&E Properties.

Certification of infeasibility or substantial conformance shall be deemed conclusive evidence and uncontestable by the Regional Board only as it relates to the suspension of \$800,000 of civil liability imposed by this paragraph.

~~For the sole purpose of determining whether or not JRMC has satisfied the conditions for suspension of \$800,000 of the civil liability imposed by this paragraph, JRMC shall be deemed to have satisfied conditions a, b, and c on SDG&E Property if JRMC has taken all reasonable and prudent steps to implement conditions a, b and c on SDG&E Property in a timely fashion but cannot satisfy conditions a, b or c on SDG&E Property due to actions or inaction of others beyond the control of JRMC, in which case JRMC shall provide the Regional Board with a certification of infeasibility, including documentation of JRMC's best efforts to satisfy conditions a, b, and c at SDG&E Properties. JRMC's certification shall be deemed absolute evidence of infeasibility and unchallengeable by the Regional Board only as it relates to the suspension of \$800,000 of civil liability imposed by this paragraph, and shall not preclude the Regional Board from initiating separate enforcement action for deficiencies in the implementation of BMPs on SDG&E Properties.~~

2. CAO No. R9-2004-0420 will be rescinded upon receipt of the signed certification of conformance.
3. Civil liability is imposed upon the City of Escondido in the amount of \$50,000. City shall pay \$25,000 of this liability on September 14, 2005 to the State Board for deposit to the State Water Pollution Cleanup and Abatement Account. City may satisfy up to \$25,000 of this liability by funding SEPs acceptable to the Regional Board. If City does not elect to fund SEPs previously determined to be acceptable by the Regional Board and

does not develop an acceptable proposal for alternatives to be funded for up to \$25,000 by December 14, 2005, then City will pay the balance of any remaining liability (up to \$25,000) no later than December 14, 2005.

4. City shall conduct a "root cause" analysis to identify those factors that resulted in City's failure to implement, or require JRMC to implement BMPs during the violation period. City shall complete the analysis, and submit a report thereof to the Regional Board by October 21, 2005. Within a month, by November 21, 2005, City will prepare and submit to the Regional Board a corrective action plan addressing any identified factors that resulted in City's failure to implement, or require JRMC to implement, BMPs during the violation period.
5. This Order entirely disposes, resolves and settles of all liability for violations alleged in Complaints Nos. R9-2005-0059 and R9-2005-0097 as well as in any Notice of Violation or Non-Compliance issued as of September 14, 2005 as to JRMC and its related entities, the City of Escondido, and all other owners of real property interests within ERTC as shown in Exhibit No.1.

I, John H. Robertus, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of an Order imposing civil liability assessed by the California Regional Water Quality Control Board, San Diego Region, on September 14, 2005.

TENTATIVE

JOHN H. ROBERTUS
Executive Officer